



## **ENVIRONMENTAL PROTECTION AGENCY**

**[FRL- 9986-04-Region 3]**

### **Delegation of Authority to the State of West Virginia to Implement and Enforce Additional or Revised National Emission Standards for Hazardous Air Pollutants Standards and New Source Performance Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of delegation of authority.

**SUMMARY:** On September 11, 2017 and September 21, 2018, the Environmental Protection Agency (EPA) sent the State of West Virginia (West Virginia) letters acknowledging that West Virginia's delegation of authority to implement and enforce the National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) had been updated, as provided for under previously approved delegation mechanisms. To inform regulated facilities and the public, EPA is making available a copy of EPA's letters to West Virginia through this notice.

**DATES:** On September 11, 2017 and September 21, 2018, EPA sent West Virginia letters acknowledging that West Virginia's delegation of authority to implement and enforce Federal NESHAPs and NSPS had been updated.

**ADDRESSES:** Copies of documents pertaining to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029. Copies of West

Virginia's submittal are also available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Emily Bertram, (215) 814-5273, or by e-mail at [bertram.emily@epa.gov](mailto:bertram.emily@epa.gov).

**SUPPLEMENTARY INFORMATION:** On June 6, 2017, West Virginia notified EPA that West Virginia had updated its incorporation by reference of Federal NESHAP and NSPS to include many such standards as found in Title 40 of the Code of Federal Regulations (CFR), Parts 60, 61, and 63 as of June 1, 2016. On September 11, 2017, EPA sent West Virginia a letter acknowledging that West Virginia now has the authority to implement and enforce the NESHAP and NSPS as specified by West Virginia in its notice to EPA, as provided for under previously approved automatic delegation mechanisms. All notifications, applications, reports, and other correspondence required pursuant to the delegated NESHAP and NSPS must be submitted to both EPA Region III and to the West Virginia Department of Environmental Protection, unless the delegated standard specifically provides that such submittals may be sent to EPA or a delegated State. In such cases, the submittals should be sent only to the West Virginia Department of Environmental Protection. A copy of EPA's September 11, 2017 letter to West Virginia follows:

“Mr. William F. Durham, Director  
Division of Air Quality  
West Virginia Department of Environmental Protection  
601 57th Street  
Charleston, West Virginia 25304

Dear Mr. Durham:

The United States Environmental Protection Agency (EPA) has previously delegated to the State of West Virginia the authority to implement and enforce various federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS), which are found at 40 CFR Parts 60, 61, and 63. In those actions EPA also delegated to West Virginia the authority to implement and enforce any future EPA NESHAP or NSPS on the condition that West Virginia legally adopt the future standards, make only allowed wording changes, and provide specified notice to EPA.

In a letter dated June 6, 2017, West Virginia informed EPA that West Virginia had updated its incorporation by reference of federal NESHAP and NSPS to include many such standards as found in 40 CFR Parts 60, 61, and 63 as of June 1, 2016. West Virginia noted that it understood it was automatically delegated the authority to implement these standards. West Virginia committed to enforcing the standards in conformance with the terms of EPA's previous delegations of authority. West Virginia made only allowed wording changes.

West Virginia provided copies of the revised West Virginia Legislative Rules which specify the NESHAP and NSPS which West Virginia has adopted by reference. These revised Legislative Rules are entitled 45 CSR 34 – "Emission Standards for Hazardous Air Pollutants," and 45 CSR 16 – "Standards of Performance for New Stationary Sources." These revised Rules have an effective date of June 1, 2017.

Accordingly, EPA acknowledges that West Virginia now has the authority, as provided for under the terms of EPA's previous delegation actions, to implement and enforce the NESHAP and NSPS standards which West Virginia adopted by reference in West Virginia's revised Legislative Rules 45 CSR 34 and 45 CSR 16, both effective on June 1, 2017.

Please note that on December 19, 2008 in *Sierra Club vs. EPA*,<sup>1</sup> the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 CFR Part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued the mandate vacating these SSM exemption provisions, which are found at 40 CFR Part 63, § 63.6(f)(1), and (h)(1).

Accordingly, EPA no longer allows sources to use the SSM exemption as provided for in the vacated provisions at 40 CFR Part 63, § 63.6(f)(1), and (h)(1), even though EPA has not yet formally removed the SSM exemption provisions from the General Provisions of 40 CFR Part 63. Because West Virginia incorporated 40 CFR Part 63 by reference, West Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 CFR Part 63 due to the Court's ruling in *Sierra Club vs. EPA*.

EPA appreciates West Virginia's continuing NESHAP and NSPS enforcement efforts, and also West Virginia's decision to take automatic delegation of additional and more recent

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<sup>1</sup> *Sierra Club v. EPA*, 551 F.3<sup>rd</sup> 1019 (D.C. Cir. 2008).

NESHAP and NSPS by adopting them by reference.

If you have any questions, please contact me or Mr. Marcos Aquino, Acting Associate Director, Office of Permits and State Programs, at 215-814-3422.

Sincerely,

Cristina Fernandez, Director  
Air Protection Division”

On June 5, 2018, West Virginia notified EPA that West Virginia had updated its incorporation by reference of Federal NESHAP and NSPS to include many such standards as found in Title 40 of the Code of Federal Regulations (CFR), Parts 60, 61, and 63 as of June 1, 2017. On September 21, 2018, EPA sent West Virginia a letter acknowledging that West Virginia now has the authority to implement and enforce the NESHAP and NSPS as specified by West Virginia in its notice to EPA, as provided for under previously approved automatic delegation mechanisms. All notifications, applications, reports, and other correspondence required pursuant to the delegated NESHAP and NSPS must be submitted to both EPA Region III and to the West Virginia Department of Environmental Protection, unless the delegated standard specifically provides that such submittals may be sent to EPA or a delegated State. In such cases, the submittals should be sent only to the West Virginia Department of Environmental Protection. A copy of EPA’s September 21, 2018 letter to West Virginia follows:

“Mr. William F. Durham, Director  
Division of Air Quality  
West Virginia Department of Environmental Protection  
601 57th Street, SE  
Charleston, West Virginia 25304

Dear Mr. Durham:

The United States Environmental Protection Agency (EPA) has previously delegated to the State of West Virginia the authority to implement and enforce various federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS), which are found at 40 CFR Parts 60, 61, and 63. In those actions EPA also delegated to West Virginia the authority to implement and enforce any future EPA NESHAP or NSPS on the condition that West Virginia legally adopt the future standards, make only allowed wording changes, and provide specified notice to EPA.

In a letter dated June 5, 2018, West Virginia informed EPA that West Virginia had updated its incorporation by reference of federal NESHAP and NSPS to include many such standards as found in 40 CFR Parts 60, 61, and 63 as of June 1, 2017. West Virginia noted that it understood it was automatically delegated the authority to implement these standards. West Virginia committed to enforcing the standards in conformance with the terms of EPA's previous delegations of authority. West Virginia made only allowed wording changes.

West Virginia provided copies of the revised West Virginia Legislative Rules which specify the NESHAP and NSPS which West Virginia has adopted by reference. These revised

Legislative Rules are entitled 45 CSR 34 – “Emission Standards for Hazardous Air Pollutants,” and 45 CSR 16 – “Standards of Performance for New Stationary Sources.” These revised Rules have an effective date of June 1, 2018.

Accordingly, EPA acknowledges that West Virginia now has the authority, as provided for under the terms of EPA’s previous delegation actions, to implement and enforce the NESHAP and NSPS standards which West Virginia adopted by reference in West Virginia’s revised Legislative Rules 45 CSR 34 and 45 CSR 16, both effective on June 1, 2018.

Please note that on December 19, 2008 in *Sierra Club vs. EPA*,<sup>2</sup> the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 CFR Part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued the mandate vacating these SSM exemption provisions, which are found at 40 CFR Part 63, § 63.6(f)(1), and (h)(1).

Accordingly, EPA no longer allows sources to use the SSM exemption as provided for in the vacated provisions at 40 CFR Part 63, § 63.6(f)(1), and (h)(1), even though EPA has not yet formally removed the SSM exemption provisions from the General Provisions of 40 CFR Part 63. Because West Virginia incorporated 40 CFR Part 63 by reference, West Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 CFR Part 63 due to the Court’s ruling in *Sierra Club vs. EPA*.

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<sup>2</sup> *Sierra Club v. EPA*, 551 F.3<sup>rd</sup> 1019 (D.C. Cir. 2008).

EPA appreciates West Virginia's continuing NESHAP and NSPS enforcement efforts, and also West Virginia's decision to take automatic delegation of additional and more recent NESHAP and NSPS by adopting them by reference.

If you have any questions, please contact me or Ms. Zelma Maldonado, Acting Associate Director, Office of Permits and State Programs, at 215-814-3448.

Sincerely,

Cristina Fernandez, Director  
Air Protection Division



This notice acknowledges the update of West Virginia's delegation of authority to implement and enforce NESHAP and NSPS.

Dated: October 23, 2018.

**Cristina Fernandez,**

*Director,*

*Air Protection Division,*

*Region III.*

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